BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AUBURN PERMENTER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,020,508
HOUSE OF HOPE, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the January 6, 2005 preliminary hearing Order of Special Administrative Law Judge Marvin Appling. Claimant was denied benefits after the Special Administrative Law Judge (SALJ) determined that claimant was not an employee of respondent on the date of accident.

ISSUES

Was claimant an employee of respondent on the date of accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the Order of the SALJ should be affirmed.

Claimant suffered accidental injury on November 28, 2004, while lifting a cerebral palsy patient who is a client of respondent's. Claimant contacted respondent's supervisor, Alma Johnson (the company president), advising her of the injury. The problem arises because Ms. Johnson contends claimant was never hired by respondent.

On November 16, 2004, claimant and a friend named Abby Flores applied with respondent to work as an in-house aide to respondent's clients. Respondent schedules specially trained caregivers for severely handicapped clients. Claimant's friend, Ms. Flores, was experienced in this field and quickly qualified for the position, going through orientation, passing all the background checks and being hired to work with a severely

handicapped cerebral palsy patient named Nikki Collins. Ms. Flores was to begin work on November 25, 2004, and was scheduled through November 28 with Ms. Collins.

Claimant was not experienced in the health care field and was not hired by respondent. However, on or about November 26, 2004, claimant was contacted by Ms. Flores and advised that she had been hired by respondent, all this regardless of the fact that claimant had undergone no interview and had filled out no papers and had been provided no training. Ms. Flores took claimant to an apartment complex called the Timbers, where the patient, Ms. Collins, resided. Ms. Flores introduced claimant to Ms. Collins and then allowed claimant to perform the regular health care services with Ms. Collins on both November 27 and 28, 2004. Shortly after returning to work on November 28, claimant suffered accidental injury to her low back. Claimant then contacted respondent and reported the injury.

Respondent denied any knowledge of claimant's employment status. Ms. Johnson immediately contacted respondent's quality assurance residential assistant, Adelfa Kurtz, and inquired of the situation. Ms. Kurtz advised that she had been contacted by the Timbers, advising that her employee had suffered a back injury. Ms. Kurtz then contacted Ms. Flores and received a text message from her by telephone, advising that Ms. Flores was en route and had simply gotten a late start. There was no indication of any injury and, therefore, Ms. Kurtz did not pursue the matter. Unbeknownst to Ms. Kurtz, the injured party was claimant.

Respondent then contacted Ms. Flores on Monday, November 29, requesting her appearance at its facility which is located at Greenwich and Harry in Wichita, Kansas. Ms. Flores advised that she would appear at respondent's offices, but she failed to appear. Since that time, Ms. Flores has been unlocatable by anyone, including claimant.

When Ms. Johnson contacted the Timbers regarding this situation, she was advised that Ms. Flores was not permitted to come onto its premises, as she had, before this incident, been involved with a client at the Timbers through another employer. The indication was Ms. Flores was involved in exploitation of that client, although additional details are not contained in this record.

The Timbers, which is a property run by the Cerebral Palsy Research Foundation, provides facilities for severely disabled individuals. This explained why Ms. Flores had worked with another client in the Timbers apartment complex, which is located at 21st and Old Manor in Wichita.

Both Ms. Johnson and Ms. Kurtz denied ever hiring claimant. In fact, Ms. Johnson, until claimant applied for workers compensation benefits, had never met claimant. Ms. Kurtz acknowledged that claimant had filled out an employment application on November 16, but noted that claimant was untrained in health care. They had considered

interviewing claimant and had gone so far as to contact Ms. Flores to request that claimant appear at respondent's office on November 29, 2004, for the purpose of conducting the initial interview to determine if employment was possible. Apparently, Ms. Flores, in deciding to take the matter one step further, elected, instead, to offer claimant employment in her stead, unbeknownst to respondent.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[1] K.S.A. 2004 Supp. 44-508(b) defines as a workman or employee or worker as "any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer."

In workers compensation across the country, traditionally, most workers compensation acts insist upon the existence of a "contract of hire, express or implied," as an essential feature of an employment relationship.[2] The Kansas Workers Compensation Act is no exception.

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.[3]

In this instance, claimant does not allege that she is an independent contractor, as no such relationship was ever agreed to by either party. Claimant, however, does argue that an agency relationship exists in that respondent's employee, Abby Flores, allegedly had the authority to bind both claimant and respondent to a contractual relationship without either of their permissions. When dealing with agency relationships, the sole concern of the vicarious liability rule, which is the consideration of a unilateral liability of a master to a stranger, is whether the master accepted and controlled the services that led to the stranger's injury.[4] The Restatement (Second) of Agency states clearly that the master must consent to the service.[5] It is acknowledged that the servant does not need to

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[1] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[2] 3 *Larson's Workers' Compensation Law* § 64.01 (2004).

[3] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[4] 3 *Larson's Workers' Compensation Law* § 64.01 (2004).

[5] Restatement (Second) of Agency § 221.

consent to service with the master or even be aware of who the master is, but in a master-servant-agency relationship, the consent of the master is mandatory. In this instance, the employer (respondent) was almost totally unaware of claimant's existence. It was most certainly unaware of the fact that claimant was working (unauthorized) with a client at a location apart from the employer's main office. Additionally, the potential fraud being perpetrated by claimant's friend, Ms. Flores, was fueled by Ms. Flores' continued contact with the employer, assuring them by telephone text messaging that she was continuing with her employment, although claiming to be running late with her appointment with the client-patient, Ms. Collins.

Both Ms. Johnson and Ms. Kurtz testified that the situation with claimant would not only be inappropriate, it would be potentially illegal, as claimant had not undergone any training or background check or necessary inoculations to ensure the safety of the clients. The situation created by Ms. Flores was not only a situation which would potentially lead to her termination, but also was in direct violation of state law and could result in respondent losing its license.

The Board determines that, based upon this record, claimant has failed to prove that she was an employee of respondent on the date of accident. Even though performing services for a client of respondent, she was doing so without respondent's authorization and without an employment contract. The Board, therefore, finds that the Order by the SALJ denying claimant benefits in this matter should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Special Administrative Law Judge Marvin Appling dated January 6, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2005.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Samantha N. Benjamin, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director